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22 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
23 **FOR THE COUNTY OF LOS ANGELES**

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PEOPLE OF THE STATE OF CALIFORNIA, ex rel. BILL LOCKYER, Attorney General and ROCKARD J. DELGADILLO, Los Angeles City Attorney,	Case No.:
Plaintiffs,	COMPLAINT FOR CIVIL PENALTY AND INJUNCTIVE RELIEF
v.	
PEPSICO, INC., a North Carolina corporation,	(Health and Safety Code § 25249.5 et seq. and Business and Professions Code § 17200)
Defendant.	

Plaintiffs, the People of the State of California, by and through Bill Lockyer, Attorney General, and Rockard J. Delgadillo, Los Angeles City Attorney, hereby allege:

///

1 **I. PRELIMINARY STATEMENT**

2 1. This complaint seeks to remedy the failure of Defendant to warn persons of exposure
3 to lead, which is a chemical known to the State of California to cause birth defects, or other
4 reproductive harm. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
5 and Safety Code section 25249.6, also known as “Proposition 65,” businesses must provide
6 persons with a “clear and reasonable warning” before exposing individuals to chemicals known
7 to the state to cause cancer or reproductive harm.

8 **II. PARTIES**

9 2. Plaintiffs are the People of the State of California, by and through Attorney General
10 Bill Lockyer and Los Angeles City Attorney Rockard J. Delgadillo. Health and Safety Code
11 section 25249.7(c) provides that actions to enforce Proposition 65 may be brought by the
12 Attorney General, a District Attorney or certain City Attorneys in the name of the People of the
13 State of California. Business and Professions Code sections 17200 *et seq.* provide that actions to
14 enforce that statute may be brought by the Attorney General in the name of the People of the
15 State of California, or by a District Attorney or City Attorney.

16 3. Defendant PEPSICO, INC. (PEPSICO) is a business entity with ten or more
17 employees that sells, or has, at times relevant to this complaint, authorized the manufacture,
18 distribution, or sale of beverage products under the brand name Pepsi and other brand names,
19 that contain lead, for sale within the State of California, without first giving clear and reasonable
20 warning.

21 **III. JURISDICTION AND VENUE**

22 4. This Court has jurisdiction pursuant to California Constitution Article VI, section 10,
23 because this case is a cause not given by statute to other trial courts.

24 5. This Court has jurisdiction over PEPSICO, because it is a business entity that does
25 sufficient business, has sufficient minimum contacts in California, or otherwise intentionally
26 avails itself of the California market, through the sale, marketing, and use of its products in
27 California, to render the exercise of jurisdiction over it by the California courts consistent with
28 traditional notions of fair play and substantial justice.

1 / / /

2 6. Venue is proper in this Court because the cause, or part thereof, arises in Los Angeles
3 County because Defendant's products are sold and consumed in this county.

4 **IV. STATUTORY BACKGROUND**

5 **A. Proposition 65**

6 7. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute
7 passed as "Proposition 65" by a vote of the people in November of 1986.

8 8. The warning requirement of Proposition 65 is contained in Health and Safety Code
9 section 25249.6, which provides:

10 No person in the course of doing business shall knowingly and intentionally
11 expose any individual to a chemical known to the state to cause cancer or
12 reproductive toxicity without first giving clear and reasonable warning to such
13 individual, except as provided in Section 25249.10.

14 9. An exposure to a chemical in a consumer product is one "which results from a
15 person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a
16 consumer good, or any exposure that results from receiving a consumer service." (Cal. Code
17 Regs., tit. 22, § 12601, subd. (b).)

18 10. Proposition 65 establishes a procedure by which the state is to develop a list of
19 chemicals "known to the State to cause cancer or reproductive toxicity." (Health & Saf. Code,
20 § 25249.8.) No warning need be given concerning a listed chemical until one year after the
21 chemical first appears on the list. (*Id.*, § 25249.10, subd. (b).)

22 11. Any person "violating or threatening to violate" the statute may be enjoined in any
23 court of competent jurisdiction. (Health & Saf. Code, § 25249.7.) To "threaten to violate" is
24 defined to mean "to create a condition in which there is a substantial probability that a violation
25 will occur." (*Id.*, § 25249.11, subd. (e).) In addition, violators are liable for civil penalties of up
26 to \$2,500 per day for each violation, recoverable in a civil action. (*Id.*, § 25249.7, subd. (b).)

27 12. Actions to enforce the law "may be brought by the Attorney General in the name of
28 the People of the State of California [or] by any district attorney [or] by any City Attorney of a

1 City having a population in excess of 750,000 . . .” (*Id.*, § 25249.7, subd. (c).) The City of Los
2 Angeles has a population in excess of 750,000 persons. Private parties are given authority to
3 enforce Proposition 65 “in the public interest,” but only if the private party first provides written
4 notice of a violation to the alleged violator, the Attorney General, and every District Attorney in
5 whose jurisdiction the alleged violation occurs. If no public prosecutors commence enforcement
6 within sixty days, then the private party may sue. (Health & Saf. Code, § 25249.7(d).)

7 13. In an action by the Attorney General, the Attorney General may “seek and recover
8 costs and attorney’s fees on behalf of any party who provides a notice pursuant to subdivision (d)
9 and who renders assistance in that action.” (*Id.*, § 25249.7, subd. (j).)

10 **B. The Unfair Competition Act**

11 14. California Business and Professions Code section 17200 provides that “unfair
12 competition shall mean and include unlawful, unfair or fraudulent business practice.” Section
13 17203 of the Business and Professions Code provides that “(a)ny person performing or
14 proposing to perform an act of unfair competition within this state may be enjoined in any court
15 of competent jurisdiction.”

16 15. Unlawful acts under the statute include any act that is unlawful that is conducted as
17 part of business activity, and therefore include violations of Proposition 65.

18 16. Business and Professions Code section 17206, subdivision (a), provides that any
19 person violating section 17200 “shall be liable for a civil penalty not to exceed two thousand five
20 hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil
21 action brought in the name of the people of the State of California by the Attorney General or by
22 any district attorney . . . [or] by any city attorney of a city . . . having a population in excess of
23 750,000.” Under section 17205, these penalties are “cumulative to each other and to the
24 remedies or penalties available under all other laws of this state.”

25 **V. FACTS**

26 17. “Lead” was placed in the Governor’s list of chemicals known to the State of
27 California to cause reproductive toxicity on February 27, 1987. It is specifically identified under
28 three subcategories: “developmental reproductive toxicity,” which means harm to the developing

1 fetus, "female reproductive toxicity," which means harm to the female reproductive system, and
2 "male reproductive toxicity," which means harm to the male reproductive system. (Cal. Code
3 Regs., tit. 22, § 12000, subd. (c).)

4 18. "Lead and lead compounds" were placed in the Governor's list of chemicals known
5 to the State of California to cause cancer on October 1, 1992. (Cal. Code Regs., tit. 22, § 12000,
6 subd. (b).)

7 19. PEPSICO is a manufacturer, distributor and marketer of carbonated beverages.
8 Most of these beverages are sold through soft drink bottlers (Bottlers) that use the syrups and
9 concentrates manufactured by PEPSICO to produce bottled or canned beverages for sale to
10 consumers. PEPSICO owns an equity interest in certain of these Bottlers.

11 20. The Bottlers produce soft drinks by combining the syrups and concentrates of
12 PEPSICO with water or carbonated water, adding additional sweetener for some of the
13 concentrates. The products are then sold to consumers under the trade names owned by
14 PEPSICO for its various brands, including "Pepsi", and using the associated trademarks and
15 trade dress for those brands, including the distinctive Pepsi labels, and, where applicable, the
16 distinctive Pepsi bottle shape.

17 21. Pursuant to its contractual arrangements with its Bottlers located in Mexico (Mexico
18 Bottlers), PEPSICO exercises a substantial degree of control over the production of Pepsi
19 (Mexican Pepsi) and other soft drinks by those Bottlers. The process followed by its bottling
20 partners in preparing the soft drinks and putting them into containers for sale to the consuming
21 public must be approved by PEPSICO, and no bottler may use a bottle or other container that has
22 not been authorized by PEPSICO.

23 22. The refillable bottles used by the Mexico Bottlers, and approved for such use by
24 PEPSICO, are decorated with painted or applied ceramic labels that contain lead. During the
25 washing process, lead from the painted labels can make its way into the refillable bottles, and as
26 a result the beverages in the bottles have contained lead.

27 23. Individuals who purchase, handle or consume refillable bottles of Mexican Pepsi are
28 exposed to lead chiefly through: (1) ingesting the beverage, and (2) contact between the bottles

1 and the skin, (3) transfer of lead from the skin to the mouth, both by transfer of lead directly
2 from the hand to mouth and by transfer of lead from the skin to objects that are put in the mouth,
3 such as food and (4) through absorption of lead through the skin. Such individuals are thus
4 exposed to the lead that is present on and in refillable bottles of the Mexican Pepsi product in
5 the course of the intended and reasonably foreseeable use of those bottles.

6 24. At all times material to this complaint, Defendant has had knowledge that refillable
7 bottles of Mexican Pepsi contain lead.

8 25. At all times material to this complaint, Defendant has had knowledge that individuals
9 within the State of California handle Mexican Pepsi in refillable bottles that contain lead and
10 consume the beverage in those bottles.

11 26. At all times material to this complaint, Defendant knew that the Mexican Pepsi
12 products in refillable bottles were sold throughout the State of California in large numbers, and
13 Defendant profited from such sales through, among other things, the sale of syrup to the Mexico
14 Bottlers whose products were sold in California.

15 27. Notwithstanding this knowledge, Defendant intentionally authorized and re-
16 authorized the sale of Mexican Pepsi products in refillable bottles that contained lead.

17 28. At all times material to this complaint, Defendant has knowingly and intentionally
18 exposed individuals within the State of California to lead. The exposure is knowing and
19 intentional because it is the result of the Defendant's deliberate act of authorizing the sale of
20 products known to contain lead in a manner whereby these products were, and would inevitably
21 be, sold to consumers within the state of California, and with the knowledge that the intended
22 use of these products will result in exposures to lead within the State of California.

23 29. Defendant has failed to provide clear and reasonable warnings that the use of the
24 products in question in California results in exposure to a chemical known to the State of
25 California to cause cancer, birth defects and other reproductive harm, and no such warning was
26 provided to those individuals by any other person.

27 **VI. FIRST CAUSE OF ACTION**

28 (Against Defendant for Violation of Proposition 65)

1 30. Paragraphs 1 through 29 are realleged as if fully set forth herein.

2 31. By committing the acts alleged above, Defendant has, in the course of doing
3 business, knowingly and intentionally exposed individuals in California to chemicals known to
4 the State of California to cause cancer or reproductive toxicity without first giving clear and
5 reasonable warning to such individuals, within the meaning of Health and Safety Code section
6 25249.6.

7 32. Said violations render Defendant liable to Plaintiffs for civil penalties not to exceed
8 \$2,500 per day for each violation, as well as other remedies.

9 **VII. SECOND CAUSE OF ACTION**

10 (Against Defendant for Unlawful Business Practices)

11 33. Paragraphs 1 through 32 are re-alleged as if fully set forth herein.

12 34. By committing the acts alleged above, Defendant has engaged in unlawful business
13 practices which constitute unfair competition within the meaning of Business and Professions
14 Code section 17200.

15 35. Said violations render Defendant liable to Plaintiffs for civil penalties not to exceed
16 \$2,500 per day for each violation.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiffs pray that the Court:

19 1. Pursuant to the First and Second Causes of Action, grant civil penalties
20 according to proof;

21 2. Pursuant to Health and Safety Code section 25249.7 and Business and
22 Professions Code section 17203, enter such temporary restraining orders, preliminary
23 injunctions, permanent injunctions, or other orders prohibiting Defendant from exposing persons
24 within the State of California to Listed Chemicals caused by the use of their products without
25 providing clear and reasonable warnings, as Plaintiffs shall specify in further application to the
26 court;

27 3. Enter such orders as “may be necessary to restore to any person in interest any
28 money or property, real or personal, which may have been acquired by means of” these unlawful

1 acts, as provided in Business and Professions Code section 17203 and other applicable laws;

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4. Award Plaintiffs their costs of suit;

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5. Grant such other and further relief as the court deems just and proper.

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Respectfully submitted,

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DATED: April __, 2006

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BILL LOCKYER, Attorney General
of the State of California

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TOM GREENE
Chief Assistant Attorney General

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Assistant Attorney General

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Attorneys for Plaintiffs People of the State of California

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